

1952.



File No. O. Constit
pt. III

Legal Department

A BRANCH

Subject:—

Opinions under the

constitution of India

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C O N T E N T S

Legal Department Vol.No.0.Constitution/52 Pt.III

Sr. No.	Compilation No.	Subject	Pages
		Opinions under the Constitution of India.	
		O.Constitution/52-III	
1.	O.No.235/16-12-52.	Re: Proposal that the dependants of the employees of a University should be exempted from paying tuition fees in the University controlled Institutions. Question whether such differentiation between students and students of the University in the matter of tuition fees is permissible under the Constitution. Articles 14,15 and 29 of the Constitution.	
2.	O.No.3676/7-3-52.	Re: Payment of rent in respect of official residence of the Governor. Emoluments, Allowances and privileges for which Governor is entitled. Question whether the Estimates Committee has in law the right to scrutinize the estimates in respect of items specified in Article 202(3)(a) of the Constitution. Articles 158(3)(4) 202(3)(a) and 203(1) of the Constitution.	
3.	R.I.No.6593/2-4-52. O.No.11054/4-7-52.	Question whether the P.W.D. can hold the competitive examination for recruitment of posts which have been excluded from the purview of the Bombay Public Service Commission under the proviso to article 320(3) or whether the competitive examination in respect of such posts also will have to be held by the P.S.C. under article 320(1).	
4.	R.I.No.13799/10-7-52 O.No.18000/30-10-52.	Questions (1) Whether it is obligatory for Govt. to entrust the work of conducting exams. to the P.S.C. or Govt. has the option not to entrust the work to it. 2) Whether the work of the commission ceases with the conduct of the exams and whether Govt. would be justified in insisting that the entire results should be communicated to it so that it can make the selection. 3) Whether the expression 'examination' in article 320(1) will not also include oral examinations or recruitment by interview since at such examinations also questions are put and marks are assigned in order to assess the relative merits of the candidates. (Pl. also see R.L.A's No.11054 dt. 4-7-52).	


 1018
 K.S.R.
 1018

5. O.No.18060/31-10-52.

Re: Applicability of certain Bombay and central Acts to the partially excluded areas under the Govt. of India Act, 1935 which have not been declared as Scheduled areas under the Constitution.

~~6. O.No.18969/14-11-52.~~

~~Re:xxx~~

6. O.No.18969/14-11-52.

Question regarding claim to Indian Citizenship.
(Pl. see Addl. Secy's No.6415 dt. 21-4-51).

7. R.I.No.20529/30-8-52.
O.No.19354/20-11-52.

Question whether the control of the High Court under articles 235 of the Constitution extends even over the Ministerial staff of the district and subordinate courts and whether the High Court is thereby empowered to transfer any member of the staff of the subordinate courts to the High Court and vice versa.

8. R.I.No.24609/23-10-52.

Question whether it is possible for an M.L.C. to accept the post of an Asstt. Project officer under the community Project Scheme without receiving any payment or remuneration directly or indirectly from Govt; and whether the mere acceptance of travelling allowance or use of Govt. conveyance would be considered as having receiving remuneration from Govt. and rendering the person liable to be disqualified for being a member of the council. Article 191(1)(a) of the Constitution.

9. O.No.20108/29-11-52.

Re: Schools established out of the Trust fund and receiving Govt. Grant which are meant only for Parsi girls.
Question whether there would be any objection to the managements of the schools applying to the Court for permission to throw open the institutions to all without distinction of caste or creed.
Art. 29(2) of the Constitution.

10. O.No.1275 Conf1/21-11-52.

Question (1) Whether it will be in order to hold dealers who are resident outside the State of Bombay as liable to pay tax under the Bombay Sales Tax Act when such dealers effect sales which are deemed to take place within the State of Bombay -

Re: Notices issued by the Supdt. of Commercial Taxes, Central circle, Bihar, under the Bihar Sales Tax Act, 1947, to certain members of the ~~Murka~~ Maskati Panchkulia cloth Market Association who it appears sell certain goods in Bihar, for registration of their names under the said Act.

Question whether it is obligatory on the part of these traders to register their names under the Bihar Sales Tax Act.

Question whether the State of Bombay is entitled to levy sales tax on Tatas under the Bombay Sales Tax Act in respect of sales ~~with~~ entered into by the Govt. of India with their (Tatas') head office at Calcutta with which their Branch Office in Bombay has nothing to do where as a

direct result of the sale the goods were despatched from their works at Jamshedpur in Bihar and were delivered to the purchaser in the State of Bombay for consumption in that State.
Article 286 of the Constitution.

11. R.I.No.21130/9-9-52
O.No.19571/22-11-52.

Re: Moneys received by or deposited with Govt. servant.
Question whether the Govt. of India view that the requirements of Article 284 are satisfied if the moneys received by the Workmen's Compensation commr. in his official capacity are credited to the Public Account and thereafter withdrawn for specific purposes in accordance with sec.8(7) of the Workmen's Compensation Act, 1923 read with rule 10 of the Workmen's Compensation Rules, is correct.
Art. 284 of the Constitution

12. R.I.No.30003/12-12-52.

(Copy of a letter No.CO/II/SR-34/147 dt. 30-10-52 from the Director of Backward Class Welfare, Bombay State, Poona re: sub-divisions of and synonyms ~~xxx~~ for recognised Backward classes.).

13. O.No.1313/27-11-52.
Confl.

Re: Dismissal of an officiating Dy. Engineer, P.W.D. who was deputed to the Bombay Housing Board as officiating Dy. ~~Engineer~~ Engineer and who was suspended by the Housing Commr. on the charge of accepting illegal gratification.
Question whether it was necessary in view of Regn.15 of the Bombay P. Service Commr. (Consultation) Regulations, 1915 to consult the Commission before taking the disciplinary action.
Question also whether article 311(1) of the Constitution prohibits a higher authority than the appointing authority, to dismiss any Govt. servant.

14. R.I.No.26130/29-10-52.
O.No.20443/5-12-52.

Re: Orders passed by P. & S.D. under G.M.No.1575/34 dated 15-8-40 informing the officers competent to sanction temporary advances from G.P.Fund that the expenses incurred in connection with the marriage of an European, Anglo-Indian or Indian Christian Subscriber or of any of his dependant are not obligatory expenses within the meaning of rule 14(1)(a)(iii) of the G.P.Fund rules.
Cancellation of the orders by P. & S.D. vide C.M.P. & S.D.No.1575/34 dt.8-11-50 as the Addl. Secy.L.D. held that the above G.M. P. & S.D. offends against article 15(1) of the Constitution, while the G. of I. is of the view that the orders in question do not violate the provisions of the Constitution.
Question whether in the circumstances, stated above the orders contained in C.M. P. & S.D.No.1575/34 dt.8-11-50 should be revoked.

15. R.I.No.13316/5-7-52
O.No.21440/19-12-52.
Re: Ismail Yusuf College, Andheri founded out of the Trust Fund and conducted by Govt.
Question regarding inability of Govt. to conduct the college in view of the provisions of the Constitution as the preference in respect of admission was to be given to Muslim students.

16. Handed over directly to P.A.(Min. Law & Edu.)
O.No.3021/27-12-52.
Re: Schools started for Parsi students only out of the Trust Fund which receive Govt. grant.
Discontinuance of Govt. grant as the school is not thrown open to non-Parsi students.
Proposal to make an application to the High Court stating that without Govt. grant it would be impossible to run the schools and hence request to grant leave to admit non-Parsi students to the schools.
Question as to what would happen if the authorities approached the court but were not given leave to throw open their schools to non-Parsis and whether in such circumstances the grants would be continued.
(Pl.see R.L.A's No.20108/29-11-52).
Article 29(2) of the Constitution.

17. R.I.No.14447/18-7-52.
O.No.18664/10-11-52.
Question whether separate reservation of posts in the various grades of State services made in favour of Scheduled castes etc. on the ground that they have been included in the backward class would be consistent with the provisions of articles 16(a) of the Constitution.

18. O.No.13734/21-8-52.
Re: Terms of the reciprocal arrangements in respect of nationalised passenger transport services by which certain concessions are granted to services of other States.
Question whether these terms are discriminatory and thereby violate article 14 of the Constitution.

19. R.I.No.8607/29-4-52.
O.No.11938/19-7-52.
Question whether Govt. can address communications direct to the Chief Presidency Magistrate under the Constitution.
Articles 233 to 237 of the Constitution.

20. R.I.No.9769/15-5-52.
O.No.14143/29-8-52.
Question whether the Constitutional provisions vest any independence in the Bombay Public Service Commission so far as its powers to correspond with the Union Public Service Commission and other State Commissions are concerned and whether under the Constitution it is necessary that Govt. should concede to it independent powers to correspond directly with the Union P.S.C. and other State P.S.Cs. as contended by it.

21. O.No.21362/1-12-52.
Question regarding signing by the Asstt. Secretary both the O.C. and F.C. of the orders passed by the Secretary or the Dy.Secy.
(Pl. see R.L.A's No.560-Secret, dt.16-6-52).

22. R.I.No.11752/14-6-52
O.No.17531/23-10-52. Re: Scholarships awarded to the students of the Victoria Jubilee Technical Institute Bombay from Sir Ellis Barrow fund through the D.L.Board, Ratnagiri Rule 2 of the rules made for the award of these Scholarships provides that any boy whose parents are inhabitants of the Ratnagiri Distt. and who is above the age of 16 is eligible for the Scholarship. Question whether there is any objection under article 15 of the Constitution to restrict the scholarships at students from Ratnagiri Distt. only.
(Pl. see R.L.A's No.11278, dt. 8-7-52).
23. O.No.261-L/30-7-52. Questions (1) Whether the vote of the Legislature is necessary for spending moneys out of the Public Accounts of the State ?
(2) Whether amounts received from the Central Govt. or other parties to meet expenditure incurred in performing specific services for them or moneys received as sale price of grain or other commodities constitute 'revenue' ?
Articles 302, 203, 204, 266 and 284 of the Constitution.
24. R.I.No.27659/15-11-52.
O.No.21975/29-12-52. Re: Applications for certificates of citizenship required ~~xxx~~ for administrative purposes.
Article 16(3) of the Constitution.
25. R.I.No.27049/10-11-52.
O.No.21158/16-12-52. Re: Scholarships to Maratha students of Mudhol High School from Shrimati Bakabai Saheb Raje Charpade Scholarship fund. Administration of the fund by the Govt. authorities of the Mudhol State at the instance of the Ruler Proposal to obtain the directions of the court under secs. 55 and 56 of the Bombay Public Trust Act, 1950 as it has become impossible for Govt. to carry out the objects of the Trust fund in view of article 15 of the Constitution.
Question whether the presumption that though in the present case a trust deed has not been executed, the consent of the Charity Commr. is necessary before making a reference to the court, is correct.
Article 15 of the Constitution read with secs. 55 and 56 of the Bombay Public Trusts Act, 1950.
26. O.No.18472/6-11-52. Question whether amounts received by Court Receivers and Liquidators should be paid into the public account of the State under Article 284 of the Constitution of India.
27. R.I.No.650-Conf1./
5-7-52.
O.No.741-Conf1./
31-7-52. Re: Mrs. Sherin Ostowar who was born of Iranian parents in Bombay and who married one Shri X F.H.Irani who had acquired Indian citizenship. She is thus Indian citizen within the meaning of article 5 of the Constitution. With the intention of exercising her right of inheritance in Iran and to return back after a short stay there ~~xxx~~ she has secured an Iranian Passport issued by the Iranian consul, Bombay and has requested the D.S.P. Poona to register her as a foreigner of Iranian nationality.

Question regarding the status
of nationality of Mrs. Ostawari
Articles 10 and 11 of the Constitution.

28. O.No.121-L/9-7-52. Question whether expenditure on a new service which can be met from savings on other items has also to be initially met in full out of the advances from the Contingency fund to be recouped after a token demand is obtained.
Articles 204 to 206 and 267 of the Constitution of India.
29. R.I.No.21316/11-9-52. G.L.F.D.No.8202/33/60047-V dt. 8/9-9-52
Re: Recoupment of the contingency fund.
30. O.No.12969/6-8-52. Question whether a tribal Pathan who ~~xx~~ has landed property in Pakistan can claim Indian citizenship under article 5 of the Constitution in view of the fact that he had no domicile in the territory of India on 26th Jan. 1950.
31. O.No.19099/17-11-52. Question regarding deciding the citizenship of a wife of a person who has acquired the domicile of India and who is also a citizen of India.
32. O.No.6696/29-4-52. Re: Reservation of seats in Educational Institutions receiving help from Govt. on the basis of religion, race, caste, sex, place of birth or any of them.
Question whether such reservation is constitutional.
Articles 15, 29 and 370 of the Constitution.
33. R.I.No.315-L/11-8-52
O.No.16451/7-10-52. Question whether the Poona University Ordinance, which imposes restriction of place of residence in respect of candidates who seek admission to the External Examinations in non-science subjects after private ~~xx~~ study offends against article 15(1) of the Constitution.
34. R.I.No.27896/18-11-52. G.L.E.D.No.CBC 1051/44836-J dt. 14-11-52.
Re: Classification of Backward Classes
Inclusion of Tadvis among the Backward Classes.
25. O.NO.14843/11-9-52. Question whether in view of the provisions of the Constitution any expenditure incurred in pursuance of anything done under the Bombay Land Improvement Schemes Act 1942 can be treated as charged expenditure since 1-4-50. Bombay Land Improvements Schemes Act, 1942 sec. 26 Articles 202(3)(6) and 390 of the Constitution.

ABK
11-11

Legal Department.

"If the Universities make it as one of the conditions of service governing their employees that their dependants such as those referred to in Minister (Finance Department)'s minute at page 1 ante shall be exempted from payment of tuition fees in the institutions controlled by them, such exemption will not be held as resulting in discrimination prohibited by article 15 of the Constitution; for the students who do not get the benefit of such exemption cannot contend that the exemption is denied to them on grounds only of religion, race, caste, sex, place of birth or any of them. Such exemption will not also offend against article 14 or any other provision of the Constitution.

Sd/- J.A. Bhurandhar.
16.2

Additional Secretary to Government.

Minister (F.D.)

V.M.D./26. 7
4c.

Office of the P.L.A.

Article 153(3) of the Constitution provides that the Governor shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and, until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule. Clause (4) of the Article further provides that the emoluments and allowances of the Governor shall not be diminished during his term of office. Clause (3) of Article 202 includes in the expenditure charged on the Consolidated Fund of each State (a) emoluments and allowances of the Governor and other expenditure relating to his office. A comparison of the Second Schedule and of the Government of India (Governor's Allowances and Privileges) Order, 1950, makes clear what is meant by emoluments and allowances; and these very provisions show that the other expenditure referred to in Article 202(3)(a) is the expenditure connected with the privileges as specified in the Govt. of India (Governor's Allowances and Privileges) Order, 1950. Although Article 203(1) will not prevent the discussion in the Legislature of the items specified in Article 202(3)(a), the question which arises for consideration is whether the Estimates Committee has in law the right to scrutinise the estimates in respect of these items. We have borrowed the Estimates Committee from the British Parliamentary Procedure; and in that country the Estimates Committee is primarily intended for the purpose of suggesting the form in which the estimates shall be presented for examination and to report what, if any, economies consistent with the policy underlying these estimates may be effected therein. (see Halsbury's Laws of

England, Vol. XXIV, p. 251). Similar duties are laid down for Committee on Estimates of the Bombay State Legislature. Rule 117C of the Rules of the Bombay Legislative Assembly contemplates that the primary duty of the Committee on Estimates is to scrutinise the budget estimate of expenditure in such detail as it may consider necessary and tender advice so as to ensure that Government's objectives are carried out in the most economical and efficient manner. Having regard to the constitutional provisions quoted above, it is obvious that the items specified in Article 202(3)(a) are beyond the pale of economy at the suggestion either of the Estimates Committee or even of the State Legislature. In that respect these items and the items under (d), namely, expenditure in respect of the salaries and allowances of Judges of any High Court, differ from the other items in clause (3) of Article 202; for these other items are capable of economy if the Legislature by suitable legislative process decides to achieve such economy. No useful purpose can, therefore, be served by the Committee on Estimates applying its mind to the items connected with the Governor in Article 202(3)(a) nor can the Legislature take any effective action upon any recommendation the Committee may make. It must, therefore, be said that the scrutiny of the estimates in respect of these items would not fall within the scope of the duties and functions which the Estimates Committee is intended to discharge.

2. In these circumstances, a convention on the lines adopted by the Government of India in respect of similar items connected with the President would be appropriate and in consonance with the spirit of the Constitution.

SD/- P.V.LaC.

7.3

Remembrances of Legal Affairs.

C.S.

No. 3676

7/3/52

V.H.D./26.7

LC

Clause (1) of article 320 of the Constitution of India provides that it shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively. Paragraphs (a) and (b) of clause (3) of the same Article further requires that the State Public Service Commission has to be consulted on the matters and topics mentioned in those paragraphs. The proviso to clause (3) says that as respects services and posts in connection with the affairs of a State, the Governor may make regulations specifying the matters in which generally or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted. Clause 3 of the Bombay Public Service Commission (Consultation) Regulations, 1951, accordingly provides that it shall not be necessary to consult the Commission in any of the matters specified in paragraphs (a) and (b) of clause (3) of Article 320 of the Constitution in respect of posts and services specified in the Schedule. Item 21 in the Schedule specified all other services and posts to which appointments are made by authorities subordinate to Government. Presumably the Subordinate Service of Engineering is included in this item. The result, therefore, is that as respects the the Subordinate Service of Engineering it is not necessary to consult the Commission on matters specified in paragraphs (a) and (b) of clause (3) of Article 320.

The question which then arises is, does the exclusion of the Commission in regard to consultation in any of the matters specified in paras. (a) and (b) of clause (3) of Article 320 also exclude the Commission's duty of holding examination under clause (1) of that Article?

The answer to that question is in the negative. In the first place clauses (1), (2) and (3) of Article

320 are mutually exclusive, and it cannot, therefore, be said that the duties enjoined on the Commission by clause (1) can be superseded by resort to the proviso to clause (3). Reading clause (1) by itself it would seem that wherever the appointments to services are to be made by examination, the duty of conducting such examination devolves upon the Public Service Commission and has to be discharged by them, and, therefore, not by any other agency. Ordinarily, therefore, the duty of conducting examinations is the exclusive obligation of the Commission under the Constitution and has no connection with the "consultation" enjoined by clause (3). Clause (3) merely deals with "consultation," whereas clauses (1) and (2) in terms enjoin a duty. Dispensation with consultation by means of regulations ^{Can} ~~do~~ not dispense with consultation enjoined by the Constitution which is a paramount document. Moreover, the regulations do not dispense with consultation in all matters. In that connection it has to be observed that it is permissible to the Governor to refer any other matter to the Commission for consultation - other than those specified in paragraphs (a) to (e) of clause (3). That the regulations dispense with consultation in respect of the subjects specified in paragraphs (a) and (b). It is, therefore, unnecessary to consult the Commission regarding the method of recruitment or the principles to be followed in making appointments or on the suitability of candidates for such appointments. But if the method of recruitment involves the machinery of examinations, the control of that machinery so far as the conduct of examinations is concerned must be delivered to the Commission under clause (1) of Art. 320. It would be open to Government not to be guided strictly by the results of the examinations in judging the suitability of the candidate or to adopt some other principle in addition to examination for making the appointment; but the task of conducting the examinations is quite distinct from the principle of making the appointment or the not

principle of making the appointment or the method of recruitment or of the suitability of the candidate. It is the duty of conducting the examinations which falls within the purview of the Commission; and that duty cannot be said to have been dispensed with by the regulations as now framed. The view taken by the Public Service Commission is, therefore, correct.

Sd/- P.M.Lad.
2.7

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No.11054 dated the 4th July 1952.

V.P.D./26.7
40.

Office of the R.L.A.

R.L.A.'s opinion No. 11054 dated the 4th July 1952 covers the first two points raised in the P. & S.D. note dated 9.7.52. The answer on both points is in the affirmative. On the third point it must be observed that a mere oral interview for the purpose of selection would not be covered by the expression "examination for recruitment to services", but a viva voce examination would be included if it be a part of a general examination.

Sd/- P.H.Lad.

29.10

Remembrancer of Legal Affairs.

G.O. to P. & S.D. No. 18000/B dated the 30th Oct. 1952.

V.H.D./26.7
40.

Legal Department.

The Legal Department is requested to state if any of the Acts mentioned at pages 8, 9 and 10 ante have been made applicable to the partially excluded areas under the Government of India Act, 1935, and which have not been declared as Scheduled areas under the Constitution.

2. The areas in question are as follows :-

- (1) The Shahada, Mandurbar and Toloda talukas of the West Khandesh District; and
- (2) the Dohad taluka and the Jhalod Mahal of the Porbhar Mahals District.

These areas were formerly partially excluded areas but are not included in the Scheduled areas. Since they were part of the partially excluded areas formerly, all the Acts applied to partially excluded areas were applicable to them automatically.

3. The Acts referred to at pages 8, 9 and 10 ante are as follows:-

Central Acts.

(1) Tolls Act, 1851, (2) Indian Tolls Act, 1864, (3) Indian Tramways Act, 1836, (4) Indian Tolls Act, 1838, (5) Indian Railways Act, 1890, (6) Indian Railway Companies Act, 1895, (7) Indian Tramways Act, 1902, (8) Indian Ports Act, 1908, (9) Indian Electricity Act, 1910, (10) Inland Steam Vessels Act, 1917, (11) Indian Merchant Shipping Act, 1923, (12) Indian Carriage of Goods by Sea Act, 1925, (13) Indian Light House Act, 1927, (14) Indian Carriage by Air Act, 1934, (15) Indian Air Craft Act, 1934, (16) Railways Transport of Goods Act, 1947 (17) Control of Shipping Act, 1947, and (18) Electricity Supply Act, 1948.

Bombay Acts.

(19) Bombay Coasting Vessels Act, 1833, (20) Bombay Steam Vessels Act, 1864, (21) Bombay Ferries Act, 1863, (22) Tolls on Roads and Bridges Act, 1875, (23) Bombay Irrigation Act, 1879, (24) Bombay Landing and Wharfage Fees Act, 1832, (25) Bombay High Ways Act, 1833, (26) Indian Electricity (Bombay Amendment) Act, 1946, (27) Bombay Electricity (Special Powers) Act, 1946, and (28) Tramways (Bombay Amendment) Act, 1943.

4. (1) The Act mentioned at serial Nos. 2 to 7, 9, 10, 12 to 15 and 21 to 23 in paragraph 3 above extended to the whole of British India and therefore also to the partially excluded areas.

(11) The Acts mentioned at serial Nos. 3, 24 and 25 contain provisions which provide for bringing them

into force or extending them by notifications of the Provincial Government. It will be necessary for the Public Works Department to verify whether or not those Acts have or have not been extended to the whole of the Province or to the areas in question -

(iii) Tolls Act, 1851, is repealed by the Tolls on Roads and Bridges Act, 1875 (Act. III of 1875);

(iv) Indian Electricity (Bombay Amendment) Act, 1946, has been applied to the partially excluded areas by Government Notification, Public Works Department No. 5660/36, dated 30th September 1946; the Bombay Electricity (Emergency Powers) Act, 1946, has been applied to those areas by Government Notification, Public Works Department No. 3902/36, dated 30th September 1946; while Tramways (Bombay Amendment) Act, 1948, has been applied to them by Government Notification, Public Works Department No. 7901/36, dated 16th November 1948;

(v) The Bombay Coasting Vessels Act, 1833 applies to the areas in question.

(vi) As regards the Acts mentioned at serial Nos. 16, 17 and 18 no information is available in this Department. They, however, do not appear to have been applied to those areas. The Public Works Department may verify the same.

(vii) As regards the Bombay Steam Vessels Act, 1864 and the Indian Merchant Shipping Act, 1923, the former except section 15 thereof has been repealed by Act VI of 1894. Section 15 provides for the application of certain provisions of the Merchant Shipping Act, 1854 to steam vessels proceeding to or from any part or place in the Presidency of Bombay. This Act by its very nature would not apply to the areas in question. The Indian Merchant Shipping Act, 1923, does not contain the extension clause. It, therefore, extended to the whole of the British India. In view of this position, though the question of application of these two enactments to

partially excluded areas does not arise it appears that they do ~~not~~ technically extend to them.

5. Some of the Acts mentioned by Public Works Department in this file might have been amended during the period of the years 1937 to 1950. Unless these amending Acts were specifically applied to the partially excluded areas under section 92 of the Government of India Act, 1935, they would not apply to them. As for example, Bombay Irrigation (Amendment) Act, 1947, was applied to them by Government Notification, Public Works Department No. 3199/36, dated 24th April 1947. Public Works Department may examine all such amending Acts made during the aforesaid period pertaining to it to see whether they are or are not applied to the partially excluded areas.

Sd/- B.P. Lalal.

30.13

Additional Deputy Secretary to Government.

U.R. to P. J., NO. 13060/B, dated the 31st October 1952.

V.M.D./26.7
4c.

Office of the R.L.A.

Copy
attached.

Attention is invited to the Additional Secretary's
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opinion No. 6415, dated the 21st April 1951. In view of the
facts stated in the letter of the Deputy Commissioner of
Police, particularly those in paragraph 4 of the letter,
which are stronger in this case than those considered in
the Additional Secretary's opinion referred to, Shri Saraya
cannot be deemed to be a citizen of India. The view taken
by the Passport Office in their memo at pages 1-2 ante
appears to be correct.

Sd/- P.M. Laj.
12.11
Branch of Legal Affairs.

U.N. to F. & S.D., No. 18969/B, dated the 14th November 1952.

V.M.D./26.7
L.C.

Office of the R.L.A.

Prior to the Government of India Act, 1935, the transfer of clerks of the Court and ministerial officers of Civil Courts was governed by section 40A of the Bombay Civil Courts Act, 1869. That section provided:

"40A. (1) The Governor of Bombay in Council may transfer a clerk of the Court or ministerial officer from any Civil Court under this Act to any other such Court.

(2) The District Judge may transfer a clerk of the Court or ministerial officer from any such Court within the local limits of his jurisdiction to any other such Court within those limits."

It will be observed that even that section granted no power to transfer a clerk of the Court or ministerial officer from any civil Court to the High Court. This section was omitted by the Adaptation of Indian Law Order in Council. However, the clerks of civil Courts and ministerial officers fall within the purview of section 241 of the Government of India Act which permitted the appointments to be made and conditions of service to be prescribed by a person authorised by the Governor. In view of the amendments made in section 10 and the omission of section 33 and 40A, a notification under section 241 of the Government of India Act became necessary and the only notification which was issued was Govt. Notification, Home Department, No. 325/4, dated the 30th March 1939, which granted the power of appointing all ministerial officers in civil Courts to District Judges and which, for the purposes of conditions of service, applied to them the Bombay Civil Services Conduct, Discipline and Appeal Rules. Apparently a clerk of the Court was treated as a ministerial officer. It is my impression that District Judges continued to make appointments of clerks of the Court out of the ministerial officers serving in the civil Courts of the District. The High Court itself accepted this position in their letter No. 3182 dated the 15th November 1938. In paragraph 2 of that letter the High

Court wrote:

"Under section 43-A of the Civil Courts Act, 1869, the Governor in Council had the power to transfer a clerk of the Court or Ministerial Officer from any Civil Court under the Act to any other such Court. This section has been omitted by the Government of India (Adaptation of Indian Laws) Order 1937, and Their Lordships think it desirable that the powers to transfer Clerks of the Court from one District to another should be exercised by the Court."

The High Court, therefore, inquired whether Government had any objection to the exercise of the power by the High Court. In their letter No. 8977/3-II-B dated the 21st December 1939 Government wrote that, subject to the stipulation that Government will retain the ultimate supervising authority, Government agrees to give the High Court the power to transfer the clerks of the courts.

2. This was the position at the time of the advent of the Constitution. The Constitution has not made any difference to that position. Article 309 of the Constitution is in similar terms to section 241 of the Government of India Act. The only difference noticeable is between section 255(3) of the Government of India Act and article 235 of the Constitution. It is apparent that in both these enactments the ^{term} "judicial service" does not include the clerks of the Court or the ministerial staff of the civil Courts in the refusal. It is true that article 235 gives to the High Court control over District Courts and Courts subordinate thereto, but such control cannot be deemed to include control for the purposes of appointments, transfers, conditions of service, etc., of the ministerial staff or the clerks of the Court in civil Courts. That power is distinct and ^{can} be given only under article 309 or the powers already given under section 241 of the Government of India Act can be continued under that article, as in fact they must be deemed to have been in this instance. Attention may also be invited to article 229(1) which in terms gives powers to the High Court of making appointments of officers and servants of the

the High Court and prescribing the conditions of their service subject to over-riding law to be made by the Legislature, which again shows that the power of appointment and prescribing conditions of service (including transfers) has to be specifically given in view of article 229.

3. The correct legal position, therefore, is that by reason of Govt. Notification, Home Department, No. 325/4, dated the 30th March 1939, which must be deemed to have been continued, and in view of Government's letter No. 6977/3-II-D quoted above, the High Court will have power, subject to the stipulation that Government will retain the ultimate supervising authority, of transferring clerks of the Court from one civil Court to another but no power has been given to the High Court to transfer a clerk of the Court or any member of the ministerial staff from the civil Courts to the High Court itself.

Sd/- P. H. Lad.
19.11
Remembrancer of Legal Affairs.

U.R to H.D. No. 19354/A dated the 20th November 1952.

V.M.D./26.7
4c.

The two schools in question, namely, Bai Fatanbai Panday Girl's High School and the J.B. Waccha High School for Parsi Girls admit only Parsi Zoroastrian girls. Since these two schools receive Government grants, Government directed the Director of Education, Poona, not to pay any more any Government grant to these schools unless the managements concerned took steps to modify the trust deeds of the schools so as to throw the schools open to the pupils of all communities. The question referred to the R.L.A. for consideration is whether there would be any objection to the managements of the schools applying to the Court for permission to throw open the institutions to all without distinction of caste or creed.

A similar question arose in the case of In re, Queen's School, Chester (1910) 1 Ch. 796. In that case it was provided by the trust deed governing the Queen's School that the headmistress shall be a member of the Church of England and that she shall under the direction of the council (meaning the board of management) make proper regulations for religious instruction to be given in the school in accordance with the doctrines of the Church of England as by law established. This part of the scheme was repugnant to the regulations for secondary schools issued by the Board of Education that no catechism or formula distinctive of any particular religious denomination should be taught in the school except as therein provided. The Board of Education accordingly informed the school that if it desired to be permanently assisted by Government grants, it must bring its constitution into accordance with the departmental requirements. As it was not possible to run the school without the grants from the Board of Education, the Court to which petition was made for modification of the scheme granted the petition and modified the scheme. In

In that case it was held that where the primary object for which a secondary school was originally founded cannot be given effect to under its existing constitution without the aid of grants from the Board of Education, the Court will modify the scheme of the Charity Commissioners under which for as it is necessary to comply with the regulations of the school was being administered so Education, the Court will to comply with the regulations of the Board of Education and enable the schools without the grants. If in the present case it would not be possible for the schools in question to carry on the schools without the grants from the Government the Court, in view of the decision referred to above, may grant permission to modify the terms of the trust deeds by which the two schools and similar other schools are governed. However, it is entirely a matter for the school authorities to consider. If they do not move the Court to modify the scheme of the trust deeds or, having so moved the Court, fail to satisfy the Court that without Government grants they would not be able to carry on the schools, or the Court is not inclined to follow the decision referred to above, that would be a circumstance with which Government has nothing to do. As long as the schools are not open to pupils of all communities, irrespective of their caste or creed, Government would not be able to continue payment of grants in view of the constitutional limitations contained in article 29(2) of the Constitution in the matter of giving aid to educational institutions out of State funds.

Ed/- P.H.Lad.

23.11

Remembrance of Legal Affairs.

U.R. to E.D. No. 20193/E, dated 29th November 1952.

Office of the R.L.A.

These three cases can be disposed of by one opinion which itself is given subject to the observations that the issue is pending before the Supreme Court whose pronouncement alone can decide it with finality.

In Bombay we have taken the view which we propose to canvass before the Supreme Court that the Explanation to clause (1) of Article 286 of the Constitution is intended to give additional power to a taxing State to tax sales which have taken place outside the State and where the property may have even passed in such outside State, if the goods have actually been delivered in the taxing State as a direct result of such sale for the purpose of consumption in the taxing State. This view which is opposed to the restrictive view taken by the Attorney-General has now received support from the judgment of the Madras High Court in the case of C. Govindarajulu Naidu & Co. v. The State of Madras (Writ Petition No. 227 of 1952). In that case the Madras High Court observed:

"The effect of this Explanation is to remove the limitation imposed by Article 245 and Article 286(1) on the power of a State to enact extra-territorial legislation and permit the State to levy sales tax on an extra-State sale, provided goods thereunder are delivered within the State. The Explanation should accordingly be construed as not taking away the positive powers of taxation conferred under Article 246 and entry No. 54 but as enlarging those powers in cases falling within the Explanation.

The result is: (a) in respect of inter-state sales, the State in which the contract is concluded is the only State which has the power to impose a tax; (b) where goods are delivered for consumption in a particular State, that State has the power to impose a tax notwithstanding that the transaction of sale is extra-state."

This very judgment has been taken to the Supreme Court in appeal.

2. For the present we should proceed on the basis that the view taken by this Department and now supported by the Madras High Court is correct. That

view also disposes of the objections regarding extra-territoriality. In respect of that objection, it must be further observed that so long as a sufficient territorial connection is established between the person sought to be charged and the territory seeking to tax him, the fact that the transaction may have been made outside the territory is not relevant: (See observations of the Privy Council in *Hallam Bros. v. Commissioner of Income-tax, Bombay*, 1948 P.L.J. 32 at p. 36). What is taxed in such cases is the transaction of sale; and in accordance with the view taken above, the power to tax such sale where delivery has been given in the taxing State as its direct result for the purpose of consumption can be gathered from the Explanation to clause (1) of Article 286. That is the view taken by the Madras High Court also in another case - Cr. Appeal No. 129 of 1952 *Papatlal Shah v. State of Madras*.

3. Having regard to these conclusions, the stand taken by the Government of Bombay in its communications to the Government of Assam is correct. It also follows as corollary that the action of the Bihar Govt. against which the Muskatli-Panchkurva Cloth Market Association has made a representation is also correct. Both these stands are correct subject to the observation that they relate to sales which come directly within the limitation of the Explanation to Article 286(1).

4. The view taken by the Collector of Sales Tax in the third case of the *Tatas* is also correct. Even the Attorney-General concedes the position that from the point of view of Article 286(1)(a) the sale in such cases takes place in Bombay. It cannot be said that such sales fall within clause (2) of Article 286. It could not be the intention of clause (2) to destroy totally the effect of the Explanation

once we proceed on the footing that the Explanation gives the power to tax sales resulting in consumption. If clause (2) of Article 236 were to be assigned such wide scope, sub-clause (a) of clause (1) would itself become onerous. The better view to take consistently with the interpretation which we seek to place upon the Explanation to clause (1) is that inter-State trade or commerce must be held to exclude a transaction in which goods are actually delivered in the taxing State as a direct result of the sale for purposes of consumption.

Sd/- P.H.Lad.

21.11

Remembrancer of Legal Affairs.

U.P. to P.D. No. 1275/B-Conf., dated 21st November 1952.

V.M.D./ 27.8
/a.

Office of the R.L.A.

Constitution of
India - Article
283 - moneys
received by or
deposited with
the Commissioner
of Workmen's
Compensation.

The view taken by the Government of India in their letter of the 17th June 1952 does not appear to be correct.

2. Under article 283, of the Constitution, all moneys received by or deposited with any officer of the State other than revenues or public moneys raised or received by the Government of the State are required to be paid into the public account of the State. Clause (2) of article 283 provides that the custody of the Consolidated Fund of the State and the Contingency Fund of the State, the payment of moneys into such Funds, the withdrawal of moneys therefrom, the custody of public moneys other than those credited to such funds received by or on behalf of the Government of the State, their payment into the public account of the State and the withdrawal of such moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law made by the Legislature of the State and until provision in that behalf is so made, shall be regulated by rules made by the Governor or the Raj Prasnakh of the State. The deposits made with the Commissioner of Workmen's Compensation under section 3 of the Workmen's Compensation Act, 1923, will have, therefore, to be credited to the Public Account under the aforesaid provision of the Constitution. (See P.D.'s Government Resolution No. 736/33 dated 24th August 1951.) Withdrawal of moneys credited to the Public Account is also governed by the provisions of clause (2) of article 283. Under that clause withdrawal can be made in accordance with the law made by the Legislature of the State and until such law is made it will have to be regulated by rules made by the Governor. Assuming that the Workmen's Compensation Act, 1923, is a law which regulates withdrawal of the aforesaid deposits from the Public Account, it is not

a law made by the Legislature of the State. No reliance can, therefore, be placed on that Act or any rules made thereunder for withdrawal of deposits in question from the Public Account. In order to enable the Commissioner to withdraw the deposits from the Public Accounts and invest them in appropriate securities it would be necessary to enact a law as contemplated by clause (2) of article 233, and until such law is made it would be necessary to make appropriate rules for the purpose under the said clause (2).

Sd/- P.M.Iad.
22.11

Remembrancer of Legal Affairs.

E.R. to P.D. No. 19571/A, dated the 22nd November 1952.

M.D./27.7
/c.

OFFICE OF THE R.L.A.

It appears from these papers that Shri Kale was a permanent Overseer in the P. W. Department. While officiating as Deputy Engineer in the same department he was deputed to the Bombay Housing Board where he was appointed officiating Deputy Engineer. His appointment as officiating Deputy Engineer in the Bombay Housing Board was outside the purview of the Commission and, therefore, the Commission's approval to his appointment to that post was not obtained. While on deputation Shri Kale had a lien on the Overseer's post in the P.W. Department. On the charge of accepting illegal gratification Shri Kale was suspended by the Housing Commissioner from Government service with effect from the 9th April 1949. This suspension was made under the orders of Government and, therefore, the orders passed by the Housing Commissioner referred to his suspension from Government service (see page 9 of P.W.D. File No. 595/48 Part II). In the letter dated the 15th May 1950 (page 101 of P.W.D. File No. 595/48 Part II) the Board requested Government to treat Shri Kale as having reverted to Government in the P.W. Department with effect from the 9th April 1949 i.e. the date on which he was suspended. Since it was under the orders of Government that Shri Kale was suspended, in view of R.L.A.'s Opinion No. 10-Conf. dated the 10th January 1949, the Political and Services Department took the view that Shri Kale's services should be deemed to have been withdrawn from the Housing Board and he should be deemed to have reverted to Government service from the date of his suspension (vide page 106 of P.W.D. File No. 595/48 Part II). In view of the position stated above, Shri Kale may be deemed to have reverted to his substantive post of Overseer in the P.W. Department during

during the period of his suspension and, therefore, in view of Regulation 15 of the Bombay Public Service Commission (Consultation) Regulations, 1951, it was not necessary to consult the Commission before taking the disciplinary action against him. The fact that Chri Kalo has been removed from service by Government and not by the Superintending Engineer is not material. It is true that Article 311(1) of the Constitution provides that a Government servant shall not be dismissed or removed by an authority subordinate to that by which he was appointed, but that article does not prohibit a higher authority, namely the State Government, from dismissing or removing a government servant from service.

Sd/- P.M.Lad.
27.11

Memorandums of Legal Affairs.

G.P. to Mr. S. Pant. No. 1313/B-Conf. dated the 27th November 1952.

V.M.D./27.7
4c.

Legal Department.

The view taken by the Government of India in their letter of 1.2.52 to the Madras Government (p. 17 ante) is not supported by any valid ground. The Govt. Memo. of 15.8.40 read with Rule 14(1) (a) (iii) of the Bombay General Provident Fund Rules is on its face based on the ground of religion and would, therefore, offend against article 15(1) of the Constitution. The presumption would be against, rather than in favour of, the Govt. order which in its specific application accords unfavourable treatment to certain citizens only on the ground of religion. It is, therefore, difficult to perceive the distinction made out by the Govt. of India. If one man's religion requires that he should incur expenses to perform certain ceremonies, any favourable treatment granted to him on that ground would be directly relatable to the factor of religion and would, therefore, be open to attack on the ground of discrimination. The constitutional prohibition against discrimination contained in article 15 broadly forbids discrimination in any guise, form or degree and cannot be circumvented by considerations such as those advanced by the Government of India. There is, therefore, no reason to depart from the view already expressed by the Additional Secretary in his opinion of 26th October 1950.

Sd/- J.R.Dhurandhar,

4.12

Additional Secretary to Government.

U.R. to P. & S.D. No. 20/43/B dated the 5th Dec. 1952.

V.M.D./27.7
4c.

Office of the R.L.A.

Attention is invited to R.L.A.'s opinion No. 20193, dated 29th November 1952. In view of the legal position stated therein it is likely that the Court may grant application for modification of the scheme governing the Schools in question but in case the application is not granted the difficulty cannot be surmounted by an amendment of the Bombay Public Trusts Act, 1950.

Sd/-P.H.Lad.
24.12
Remembrancer of Legal Affairs.

Minister (Law and Edn.)

V.H.D./27.7
45.

Office of the R.L.A.

Clause (4) of Article 16 provides that nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which in the opinion of the State is not adequately represented in the services under the State. The underlined words make it clear that it is permissible in respect of each Backward Class of citizens which Government may select for purposes of this clause to make any special provision in other a different percentage of reservation can be prescribed in respect of each different Backward Class. The clause does not insist upon a uniform percentage for all kinds of Backward Classes lumped together. G.R.P. & S.D. No. 490/46, dated 1.11.1950 acknowledges that certain Scheduled castes and certain Scheduled tribes shown in Sections I and II of the list attached to the G.R. are Backward Classes. It would, therefore, be permissible for Government to make reservation in the manner suggested by Shri Lengar in his letter in respect of Scheduled castes and Scheduled tribes as shown in the list so long as it is made clear that the reservation is not made qua Scheduled castes or Scheduled tribes as such but as Backward Classes.

Sd/- P.M.Lad.
8.11

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 18664/B, dated the 10th November 1952.

OFFICE OF THE R.L.A.

The terms of the reciprocal arrangements are set out in para. 2 of the State Transport Officer's letter of 10th June 1952 at pages 33-39 ante. It will be seen from these terms that certain concessions or advantages are granted to nationalised passenger transport services of other States. The question is whether these terms are discriminatory and thereby violate article 14 of the Constitution. A similar question was considered by the Supreme Court in the Prohibition case. In that case the Supreme Court considered whether concessions shown to the warships, troopships and military and naval messes and canteens in the Prohibition Act was a violation of the principle of equality and for the reasons stated in its judgment the Supreme Court came to the conclusion that there was nothing wrong in the Legislature according special treatment to persons who form a class by themselves. Similarly in the present case the nationalised passenger transport services of other States can be reasonably considered as forming a class by themselves and the concessions that would be accorded to those transport services as per terms of the reciprocal arrangements cannot be assailed as violating the provisions of article 14. The classification of nationalised passenger transport services is a reasonable classification and one who would assail it will have to carry the burden of showing that it does not rest on any reasonable basis. It will be pertinent to refer here to the following observations of the Supreme Court of America in the case of Ketch v. Board of River Port Pilot Commissioner (330 U.S. 552), namely:-

" The constitutional command for a state to afford equal protection of the laws sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be

subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws."

Sd/- P.M.Lad.

21.8

Remembrancer of Legal Affairs.

U.R. to H.D. No. 13734, dated the 21st August 1952.

V.M.D./27.7

40.

Chapter VI in Part VI of the Constitution deals with Subordinate courts including the courts of Magistrates. It follows from article 237 in that Chapter that as long as no notification is issued by the Governor under that article, the High Court cannot as a matter of constitutional right claim control over any class or classes of Magistrates in the State and Government will be within their constitutional rights in addressing communications to them in all matters. Even after such notification is issued, apart from the exceptions and modifications contained in such notification, the control over Chief Presidency Magistrates and Additional Chief Presidency Magistrates must continue with Government in the matter of their leave. Postings and promotions of Chief Presidency Magistrate and Additional Chief Presidency Magistrate are to be made in consultation with the High Court under article 233 read with article 236 but the grant of leave is not subject to such consultation and therefore direct correspondence with the Chief Presidency Magistrate and the Additional Chief Presidency Magistrate in the matter of their leave will in any case be permissible under the Constitution. The High Court, however, speak of certain 'promises' regarding which no information is available in the papers. Although the strict constitutional position is as stated above, it is a matter for Government's consideration whether any convention should be established in this behalf until the notification under article 237 is issued. At the time of issuing such notification, the question may be specifically considered with a view to making modifications or exceptions, if any are intended, for if the provisions of article 235 are made applicable in their entirety it would not be feasible for Government to maintain direct correspondence

correspondence with the Magistrates to whom the notification may apply.

Sd/- P.M.Lad.
18.7
Remembrancer of Legal Affairs.

U.R. to H.D. No. 11938, dated the 19th July 1952.

V.M.D./27.7
Ls.

OFFICE OF THE R.L.A.

It would be seen from the various articles in Chapter II in Part ^{XIV} ~~III~~ of the Constitution dealing with the Public Service Commissions that the Commission is an autonomous body and is not subject to the control of the State Government. Attention is, in this connection, invited to the observations of Dr. Ambedkar and Shri Aliyengar made in the course of debates on the amendment of article 235A (pages 592 and 625 - Vol. IX of the Constituent Assembly Debates). It is true that in virtue of entry 41 in List II it would be open to the State Legislature to make a law providing for the rules of business which the State Public Service Commission should follow and empower thereunder the State Government to put restrictions on the powers of the Commission in the matter of carrying on correspondence with other Commissions. But so long as no such law is made, the Public Service Commission would be free to carry on such correspondence with other Public Service Commissions, including the Union Public Service Commission on all matters which legitimately fall within the sphere of their business under the Constitution.

Sd/- P.M.Lad.

28.8

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 14143, dated the 29th August 1952.

V.H.D./27.7
40.

Office of the R.L.A.

Attention is invited to R.L.A.'s Opinion No. 560-Secret, dated the 16th June 1952. If as stated in Chief Secretary's note of 20.10.52, at pages 6-7 ante the orders are passed by the Secretary or the Deputy Secretary, there would be no objection to the Assistant Secretary signing both the O.C. and F.C. of those order provided the Assistant Secretary signs them in his capacity as Assistant Secretary.

Sd/- P.H.Lad.

17.12

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 21362/B dated the 18th December 1952.

V.M.D./27.7

4c.

OFFICE OF THE R.L.A.

Attention is invited to R.L.A.'s opinion No. 11273, dated the 8th July 1952 (copy attached). To put the matter beyond doubt, it would be desirable to amend the existing rule 2 (which awards scholarships to boys whose parents are inhabitants of Patnagiri District) so as to restrict the scholarships to candidates who are ordinarily resident in the District of Patnagiri irrespective of the fact whether they are born in the district or not.

Sd/- P.M.Lad.

22.10.52

Remembrances of Legal Affairs.

U.R. to E.D.No. 17531/U, dated the 23rd October 1952.

V.H.D./27.7
40.

Local Department.

The Officer on Special Duty, Finance Department, States, that the vote of the Legislature is required in respect of funds to be spent out of the Consolidated Fund of the State and that no vote of the Legislature is needed for spending monies out of the Public Account of the State. Clause (1) of article 266 of the Constitution provides that (i) all revenues received by the Government of a State, (ii) all loans raised by the Government and (iii) all monies received by the Government in repayment of the said loans form part of the Consolidated Fund of the State. Clause (2) of the article then provides that all other public monies received by the Government of a State shall be credited to the public account of the State. Article 266, therefore, draws a clear and express distinction between the public monies which form part of the Consolidated Fund of the State and other public monies which do not so form part. Under Article 202, the statement of the estimated receipts and expenditure which is referred to in the Constitution as 'The Annual Financial Statement' or which is popularly known as the 'budget' is confined to the expenditure (either charged or not) to be met from the Consolidated Fund. This article makes it clear that the expenditure to be met from other public monies referred to in clause (2) of article 266 is not to be included in the annual financial statement or budget. After the grants are assented to by the Legislature under article 203, article 204 which relates to the appropriation Bills provides that the said Bills are to provide for the appropriation out of the Consolidated Fund. Neither article 203 nor 204 refer to other public monies which do not form part of the Consolidated Fund of the State. It is therefore, clear that no expenditure out of the other public monies referred to in clause (2) of article 266 is to be submitted to the vote of the Legislature and no such expenditure can be included in the appropriation Bills to be prepared and passed under Art. 4.

2. It is, however, true that the term 'revenue' has not been defined in the Constitution. Lutz on 'Public Finance' at page 190 states that 'modern writers have discussed the proper classification of the public revenues. Each suggests different categories, but there is fairly general agreement regarding the fundamental features. At page 192 he advocated the following classification as being in accord with the character of the State's receipts from different sources :-

- (1) Commercial revenues.
- (2) Administrative and miscellaneous revenues.
- (3) Taxation.
- (4) Public loans.
- (5) Subvention and grants.
- (6) Book-keeping revenues or licence fees.

So far as the Constitution of India is concerned, as pointed out above, a distinction is drawn between the public monies which form part of the Consolidated Fund and other public monies. Although the expression 'revenue' is not defined or explained, so far as other public monies are concerned some indication is offered by the provisions of article 284, which refers to the monies received by officers: Thus if any taxes such as Sugar Cane Cess levied under the Sugar Cane Cess Act are credited to a Separate Fund, or contributions or fees received under the Bombay Public Trusts Act are credited to the Public Trust Fund, such monies although public monies, would not form part of the Consolidated Fund and any expenditure out of the same is not to be submitted to the vote of the -- Legislature. So also the amounts received from the Central Government or other authorities to meet the expenditure incurred on performing specific services for them would not be revenues within the meaning of article 266(1) of the Constitution. But the monies received as sale price of grain or other commodities would constitute revenues since they are relatable to the

commercial operations of the State Government which it is entitled to carry on in its Statutory duty of regulating the production and distribution of goods.

Sd/- J. R. Dhurandhar.
30.7

Additional Secretary to Government.

U.R. to F.D. (in Poona) No. 261-L, dated the 30th July 1952.

V.H.D./28.7
L.S.

Office of the R.L.A.

No point of law has been raised in this reference. R.L.A. would, however, like to invite attention to the Additional Secretary's opinion No. 6979 dated 2.5.1951 and to R.L.A.'s opinion 546 dated 10.1.1951, and also to R.L.A.'s opinions No. 14235 dated 30.3.1952 and No. 17542/A dated 23.10.1952. In view of these opinions and in view also of article 16(3) of the Constitution, it would be safer to use the expression "ordinarily resident" in place of "domiciled" in the State of Bombay.

Sd/- P.H.Lqd.
26.12.

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 21975/A, dated the 29th December 1952.

V.M.D./27.7
40.

Office of the R.L.A.

Constitution -
Article 15 -
read with
sections 55 and
56 of Bombay
Public Trusts
Act, 1950 -
Scholarships to
Maratha Students
of Kuthel High
School from
Shrimati Bakabai
Saheb Eaje
Gherpade
Scholarship Fund.

Since the trust appears to have been managed by the Kuthel Government from the very beginning that Government and not the present ruler of the Kuthel State was the constructive trustee of the trust in question. This Government as a successor to the Kuthel State Government is, therefore, at present the constructive trustee of the said trust. As in view of the provisions of article 15 of the Constitution it has become impossible for Government to carry out the obligations attached to the trust, it would be necessary for Government to apply to the Court for directions under sections 55 and 56 of the Bombay Public Trusts Act, 1950, after obtaining the consent of the Charity Commissioner (Cf. R.L.A.'s Opinion No. 5473, dated the 12th April 1952). The presumption made in the Education Department's note at pages 43-44 ante, that although a trust deed has not been executed in this case the consent of the Charity Commissioner is necessary before making a reference to the Court for directions is, therefore, correct.

Sd/- P.M.Lad.

15,12

Remembrancer of Legal Affairs.

U.R. to E.D. No. 21158/A, dated the 16th December 1952.

V.M.D./28.7
404

Article 234,
Constitution of
India - applica -
tion of to moneys
received by Court
Receiver and Official
Liquidator.

The question raised for the R.L.A.'s consideration is whether amounts received by Court Receivers and Liquidators should be paid into the public account of the State under Article 234 of the Constitution of India.

2. Article 234(b) of the Constitution of India provides that all monies received by or deposited with any court within the territory of India to the credit of any cause, matter, account or persons, shall be paid into the public account of India or the public account of the State, as the case may be. "The Receiver appointed in a particular suit is nothing more than the hand of the Court, so to speak, for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of a court in order to preserve the subject matter of the suit pendente lite. The possession of the Receiver is simply the possession of the Court. The Receiver's possession is not a possession by any personal right. It is the possession of the Court and he is totally devoid of any interest in the property (Woodroffe on Law Relating to Receivers in British India, pp. 324 and Wilkinson v. Gangadhar Sirkar, 6 B.L.R. 406). In view of this legal position it appears that all monies received by a Receiver would be deemed to be received by a court within the meaning of article 234(b) of the Constitution. Similar would be the position of a Liquidator appointed by the Court. However, it can be argued that the amount received by a Receiver would not be an amount received by the Court; and for, although the Receiver is an officer of the Court and his possession is the possession of the Court, subject to the orders of the Court, he is entitled to possession and custody and also to realization, management, protection, preservation and improvement of the

property, the collection of rents and profits and further to the application and disposal of such rents and profits (vide Order XL, Rule I of C. P. C.). These provisions clearly show that the receiver, unlike an officer of the State contemplated by clause (a) of Article 234 of the Constitution, is entitled to custody of the moneys received by him. Moreover, the moneys in the hands of the Receiver always remain in safe custody because, first, he is required to furnish security and secondly, he is required to submit accounts at regular periods to the court. The position of an Official Liquidator is similar. An Official Liquidator has under section 179 of the Indian Companies Act, power inter alia to carry on the business of a company, to sell its property and to do all acts necessary for such purpose. The liquidator will not be able to perform these functions without having in his custody the moneys of the company. Further under section 182(2), he is required to submit an account of his receipts and payments to the court at least twice a year. These provisions which allow a Court Receiver and an Official Liquidator to keep in their possession moneys received by them with power to dispose of the funds in their possession appear to exclude the application of article 234 to them. In these circumstances, the position appears to be doubtful. The High Court has not expressed any definite view on the legal aspect of the case. The High Court is opposing the application of article 234 of the Constitution to the funds received by a Court Receiver and a Liquidator on the ground that if the funds received by them are to be paid into the public account of the State, the interest which would otherwise have been earned by the persons by whom the amounts have been paid would be lost to them, but this objection does not appear to be valid. If article 234 applies,

to the funds received by a Court Receiver and a Liquidator, the amounts must be paid into the public account of the State.

The question is of all-India importance. It appears, therefore, advisable to consult the Government of India so that uniform policy may be evolved throughout the Union.

Sd/- P.H.Lad.
5.11.
Remembrancer of Legal Affairs.

V.R. to H.D., No. 18472 A, dated the 6th November 1952.

V.H.D./23.7
40.

OFFICE OF THE P.L.A.

On her own admission as also from the information given in para. 1 of the Deputy Inspector General of Police's letter on page 1 ante, it is clear that Mrs. Ostowari is a citizen of India within the meaning of article 5 of the Constitution. Article 9 inter alia provides that no person shall be a citizen of India by virtue of article 5, if he has voluntarily acquired the citizenship of any foreign State. Article 5 provides for citizenship at the commencement of the Constitution. Since Mrs. Ostowari was a citizen of India at the commencement of the Constitution, article 9 does not apply in her case. Article 10 provides that every person who is or is deemed to be a citizen of India under any of the provisions of Part II of the Constitution shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen. Article 11 enables the Parliament to make any provision with respect to the acquisition and termination of citizenship and all matters relating to citizenship. No such law has so far been made by Parliament. There is no other provision in the Constitution for the voluntary renunciation of the citizenship by a person or for the cessation of the same by voluntary becoming the citizen of any foreign State after the commencement of the Constitution. Consequently, Mrs. Ostowari will continue to be a citizen of India in virtue of the provisions of article 10, irrespective of the fact that she has acquired an Iranian passport. She cannot therefore be registered as foreigner under the Registration of Foreigners Act, 1939.

Sd/- P.M.Lad.

30.7

Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 741-Conf., dated the 31st July 1952.

LEGAL DEPARTMENT.

The question for the R.L.A's consideration is whether expenditure on a new service which can be met from savings on other items has also to be initially met in full out of advances from the Contingency Fund to be recouped after a token demand is obtained.

Article 267(2) of the Constitution provides that the Contingency Fund of the State shall be placed at the disposal of the Governor to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorisation of such expenditure by the Legislature of the State by law under article 205 or article 206. Article 206, which relates to the votes on account, votes of credit and exceptional grants, has no application to this case. Article 205(1) (a) provides that if the amount authorised by any law made in accordance with the provisions of article 204 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, the Governor shall cause to be laid before the House or the Houses of the Legislature of the State another statement showing the estimated amount of that expenditure. The supplementary or additional expenditure contemplated by the provisions of article 205(1)(a) appears to be expenditure intended to be incurred in addition to the expenditure specified in the Appropriation Act in respect of a particular grant or in addition to the grants specified in such Act. But that is not the case in the case of token grants made permissible under Rule 130D of the Bombay Legislative Assembly Rules. Under that Rule when funds to meet expenditure

on a new service can be made available by re-appropriation, a demand for the grant of a token sum may be submitted to the vote of the Assembly. Thus when token demands are made and granted, and as stated by Finance Department at page 21 ante expenditure is not by diversion of expenditure on other items in the grant already voted by the Legislative Assembly, no question of making any advances from the Contingency Fund for the purpose of meeting expenditure on new services arises. Therefore, the view taken by the Accountant General that such expenditure has to be initially met in full out of the advances from the Contingency Fund is not correct.

Sd/- J.R.Churandhar.

9.7

Additional Secretary to Government.

U.R. To F.D. No. 121-L, dated the 9th July 1952.

V.M.D./23.7
4a.

From the facts stated by the Commissioner of Police in his letter of 5th November 1951 at pages 11-12 ante, it appears that Shri Maldin is a native of Kholon in Kehat District which is a tribal area. He has landed property at Kholon and his wife and family are resident there. Shri Maldin first came to India some 26 years ago in search of employment and thereafter he visited his native place over prolonged periods. He came to Bombay last in 1946 and has been there since then. He has been registered as a Tribal Pathan and holds foreigner's registration certificate dated 7th December 1949. He has, however, obtained on 21st December 1950 a certificate of domicile in the State of Bombay from the Presidency Magistrate (copy of the certificate at page 3 ante). In the certificate the ground for the grant of certificate is stated as residence in the State for over ten years.

2. In order that a person can claim to be a citizen of India under article 5 of the Constitution, he must prove that at the commencement of the Constitution, i.e. 26th January 1950, he had a domicile in a territory of India, and

- (a) he was born in the territory of India, or
- (b) either of his parents was born in the territory of India, or
- (c) he has been ordinarily resident in the territory of India for not less than 5 years immediately preceding such commencement.

In the case of Shri Maldin it may be assumed from the facts stated that he had been ordinarily resident in the territory of India for not less than 5 years immediately preceding 26th January 1950. But the question is whether on 26th January 1950 he had his domicile in India. Attention is in this connection invited to R.L.A.'s opinion No. 13993, dated the 31st August 1951, in which the question of acquisition of domicile has been considered. In that case the person concerned had obtained a domicile

certificate from the Chief Presidency Magistrate, but in view of the facts present in that case it was held that domicile certificate could not be given much weight. Similarly in this case the facts that Shri Maldin has landed property in Pakistan, his wife and family are resident in Pakistan and he has been registered as a foreigner, are sufficient to prove that on 26th January 1950 he had no domicile in the territory of India. Prima facie the Presidency Magistrate in issuing the domicile certificate had not taken into account these facts. Shri Maldin cannot, therefore, be considered to be a citizen of India under article 5 of the Constitution. It does not appear that Shri Maldin's case falls either under article 6 of the Constitution, for presumably neither he nor any of his parents nor any of his grand-parents was born in India as defined in the Government of India Act, 1935. Since Shri Maldin is not a citizen of India by virtue of article 5 nor can he be deemed to be a citizen of India by virtue of article 6, it is not necessary to consider whether he has voluntarily acquired the citizenship of any foreign State. Article 9 of the Constitution has no application to his case.

Sd/- P.H.Lad.

4.B

Recommencer of Legal Affairs.

U.R. to P. & S.D., No. 12969, dated the 6th August 1952.

V.H.D./23.7
4a.

Office of the R.L.A.

If as stated in the note of the Political and Services Department at pp. 57-58 ante the husband of Mrs. Gourgey has acquired the domicile of India, the domicile of Mrs. Gourgey will follow that of her husband (See sub-rule (2) of rule 9 on p. 137 of Dicey's Conflict of Laws). Mrs. Gourgey cannot, therefore, have any other domicile than that of her husband. (See ^{rule} ~~note~~ 10 on page 139 of the same book). She is, like her husband, a citizen of India and the fact that she has not so far applied for the Indian citizenship is immaterial. Of course, it is open to an Indian citizen to give up his Indian citizenship and acquire another nationality under article 9 of the Constitution of India. But until proof in support thereof is forthcoming, it cannot be held that Mrs. Gourgey is not a citizen of India.

Sd/- P.M.Lad.

17.11

Remembrancer of Legal Affairs.

U.T. to P. & S.D. No. 19099/B dated 17th November 1952.

V.H.D./23.7.
4a.

This question is governed by the following provisions of the Constitution. Firstly, Article 15(1) provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Secondly, Article 29(2) provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. By the recent amendment the following clause is added to Article 15 :

"Nothing in this Article or clause (2) of Article 29 shall prevent a State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

It will thus be observed that Article 15(1) generally prohibits discrimination which is based only on certain grounds. Article 29(2) prohibits denial of admission which is based only on certain grounds; and the recent amendment permits a special provision in respect of certain classes of citizens or castes and tribes.

2. Reservation as such has two effects. In the first place it discriminates against the persons for whom no reservation is made; because to the extent of the reservation they are denied the opportunity to receive education, however qualified they may otherwise be by merit. Reservation also results in the denial of admission to students who but for the reservation would have been admitted on their merits. Reservation, therefore, is generally opposed to the principle of equality of opportunity which runs throughout the Constitution like a golden thread.

3. Reservation which is intended for students from Part A, B or C States or from Jammu & Kashmir

would offend against the Constitution if it can be unmistakably related to place of birth. Even Kashmir is part of India (vide Article 1 and Article 370 (1)(c) of the Constitution), and a student from the State of Kashmir would also be a citizen of India. To say that reservation is made in favour of a person born in any particular State of India would definitely offend against the clear provisions of Article 15(1). It would seem that reservation in favour of students from a particular State would practically mean reservation in favour of students born in that State, and to that extent such reservation would be substantially in contravention of Article 15(1). Reservation would, however, be possible without violating the Constitution if it can be related to a principle other than that of residence or domicile in a State. Such principle in my opinion should be that of passing a qualifying examination of a University. Thus, it could be provided that so many seats are reserved for persons who have passed such certain examinations of any particular Universities in India, and among such Universities could then be included only those Universities which do not provide facilities for education in the particular branch, such as, engineering etc. Such reservation would not be in contravention of either Article 15(1) or Article 29(2). Reservation in favour of foreigners or persons from abroad would not also be in contravention of Article 15(1) or 29(2), since these Articles apply only to "citizens".

Sd/- P.M.Lad.

29.4

Remembrancer of Legal Affairs.

U.R. to E.D.No. 6696, dated the 29th April 1952.

Legal Department.

Section 26 of the Bombay Land Improvement Schemes Act, 1942, provides that the expenditure incurred by the State Government in pursuance of anything done under that Act shall be charged on the revenues of the State. After the commencement of the Constitution on 26th January 1950, the above mentioned charging provision was kept in force upto 31st March 1950 under the provisions of article 390 of the Constitution & as required by that article ~~the~~ the expenditure incurred between 26.1.50 and 31.3.50 was specified in the schedule of the authorised expenditure. From 1st April 1950, for purposes of charging any expenditure on the Consolidated Fund of the State in accordance with the provisions of article 202(3)(f) of the Constitution, the law charging the expenditure should be the law of a Legislature functioning under the Constitution. (Cf. Ministry of Finance letter No. D. 6710-B. 1/50, dated 6th July 1950). As section 26 of the Bombay Land Improvement Schemes Act, 1942, is not such a law it has ceased to be in force from 1st April 1950. Any expenditure incurred ~~in~~ pursuance of anything done under the Land Improvement Schemes Act cannot be treated as charged expenditure since 1.4.1950.

Sd/- J.R.Dinurandhar.

9.9

Additional Secretary to Government.

U.R. to A. & P.D., No. 14343-B, dated the 11th September 1952.

Y.M.D./23.7
Lc.